NO. 2509.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GREAT NORTHERN RAILWAY COMPANY, a Corporation.

Plaintiff in Error,

vs.

GRACE MUSTELL, as Administratrix of the Estate of FRED G. MUSTELL, deceased, and as the personal representative of said FRED G. MUSTELL, deceased, and for and on behalf of GRACE MUSTELL, the widow and minor child, respectively, of said FRED G. MUSTELL, deceased.

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

Upon Writ of Error to the United States District Court, for the Eastern District of Washington, Northern Division.

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BRIEF.

This writ of error is sued out, the object of which is to reverse the action of the lower Court in refusing to grant defendant judgment *non-obstante-verdicto*. No new trial is asked for or desired. No errors of law are claimed, excepting the one above referred to, and in support of defendant's position, it is claimed that there is no evidence, or no reasonable inferences to be drawn from the evidence, which could, considering it most favorably to the plaintiff, sustain the charge of negligence alleged in the complaint.

While defendant refuses to specifically admit that the deceased Fred G. Mustell was, at the time of his death, employed in interstate commerce by the defendant company, the condition of the pleadings are such that it must be held, as a matter of law, that the deceased was so employed. The answer admits that defendant is an interstate railroad, and that the deceased was a car checker, performing his duties as such in the division yards at Hillyard, Washington, at the time of his death. The case of St. Louis, San Francisco & Texas Railway Company vs. Seale, 57 Law Edition, United States Supreme Court Reports, page 1129, holds that a car checker of interstate cars, is employed in interstate commerce, within the meaning of the Federal Employers' Liability Act.

The complaint sets up the destination of the cars which were checked by Mustell, and whose report

he was carrying to the depot when he was killed, and the answer admits that said cars were destined to Vancouver, British Columbia, Canada. Therefore, it must be conceded that he was employed in interstate commerce, this concession having been made, there is no Federal question left in the case. We refer to this, because one of the assignments of error made by defendant is "that defendant was not guilty of negligence within the meaning of the Federal Employers' Liability Act." It must be conceded that what constitutes negligence at common law, constitutes negligence within the meaning of the Federal Employers' Liability Act. Negligence in one instance, must be negligence in the other. There is no such thing as negligence "within the meaning of the Federal Employers' Liability Act," because that Act does not define what is, or what is not negligence. It leaves us to follow the common law rule.

Therefore, in discussing the question of negligence in this brief, we will discuss common law negligence only.

We have always deemed it one of the duties of counsel in the presentation of a case to the Court to do everything possible to aid the Court in determining the legal questions involved, and knowing the rule of law that has been laid down by this Court, and every other Court, by thousands of decisions, against which there is no dissenting opinion, to-wit: that in the consideration of the question in-

volved in this case, *the Court must consider the evidence, and that evidence, which is most favorable, and in the most favorable light, together with all reasonable inferences which the jury would have a right to draw from said evidence, in support of the verdict and judgment of the lower Court,* counsel for defendant has followed out the usual and customary practice of attorneys for defendants in these class of cases, and has seen fit only to call the Court's attention to the evidence in the record which is *most favorable to the defendant,* and in defendant's most favorable light.

Of course, able counsel for the defendant must know of the rule heretofore referred to, and knowing that this Court will consider the evidence with all of the reasonable inferences to be drawn therefrom, in its most favorable light, in order to sustain the verdict, we cannot understand why the defendant's counsel should not present its argument along those lines, and thereby aid the Court very substantially and materially in determining the questions involved.

In answering the defendant's brief, we will present the evidence in the manner and form which this Court will consider, to-wit: in the most favorable light to sustain the verdict and judgment of the lower Court, and if upon all the evidence, together with all the reasonable inferences to be drawn therefrom, the Court can say as a matter of law that there was no negligence of the defendant,

and that no two reasonable minds could differ, then this cause should be reversed, otherwise, it should be affirmed.

If the Court can further say that if the defendand was negligent, the deceased assumed the risk of this negligence; that negligence was so universally the custom of defendant in carrying on its switching operations that the deceased either knew, or ought to have known of such universal negligence, and appreciated the risk he was taking in performing his duties in the defendant's yards, and that no two reasonable minds could differ thereon, the judgment must be reversed. These are the only two legal points involved in this case.

STATEMENT OF THE CASE.

Fred G. Mustell, twenty-three years of age, being married and having a wife, and a child nine months old, was a car checker in the yards of the Company at Hillyard, Washington. Immediately prior to his death, he had just completed the checking of a train composed of interstate and intra-state cars, and was on his way to the depot to turn in his report, so as to enable the Company to conduct its switching operations in carrying on its interstate business. After completing the checking of said train standing on track number 5, and after instructing Henry Cantley with reference to the duties of a car checker, he and Cantley start across the tracks in the direction of the depot, passing through that part of the yard through which it was usual and

customary to pass on such occasions. In doing so, it became necessary for him to cross over track number 1, upon which was standing perfectly still, tied down by brakes, a string of sixteen box cars. Mustell and Cantley attempted to cross said track number 1, a reasonably safe distance from the end of said string of cars, the distance being anywhere from one foot to ten feet. Mustell was a few feet ahead of Cantley, and slightly closer to the end of the string of cars. There was nothing to indicate to Mustell or Cantley that any cars were being kicked down upon the standing string of cars. The switch engine which was in operation, and the only one about which any testimony was given, was standing up near the depot about 1025 feet from the point where Mustell was killed, the smoke of which engine was going straight up, which indicates to any rational person that the engine must have been standing still. The map offered in evidence, shows that the track curves from its intersection with the main line, so that if a string of cars was moving towards the string that was standing still, it could not be seen, but the movement of the engine could be determined by the smoke and puffiing providing the engine was shoving the string of cars, but if the string of cars was kicked in, the engine would still remain standing at the point from which the kick was made, and the smoke would go straight up, as it did. One of the reasonable inferences to be drawn from the evidence is that if a string of cars were kicked in

onto the string that was standing still that hit Mustell, *in the ordinary manner,* or in a reasonably careful or usual manner, it would take up the slack of the standing string of sixteen cars, which would give Mustell sufficient warning that said string was about to move, so as to enable him to get out from any position of danger, but, just as Mustell got onto the track, the whole string of sixteen cars suddenly and without warning moved forward and violently, striking Mustell before he could get out of the way, and Cantley just barely had time to jump out of the way.

The string of sixteen cars moved four or five car lengths before it stopped. The movement of the standing string of cars was caused by another string of cars being thrown in on track number 1 with such violence, colliding with said string of sixteen cars in such a manner, and with such a forcible impact that Mustell was not able to get out of the way, and was killed.

The accident happening upon the premises of the railway company, and in the presence of witnesses only who were in the employ of the company, and the deceased being dead and his lips sealed, we appreciate how difficult it is for us to obtain any as direct evidence as we would like to obtain as to the real facts which caused the death of Fred Mustell, and are compelled to resort largely to circumstantial evidence, aided by direct evidence and physical facts. No bell or other signal was

given, nor was any movement observable which would indicate to Mustel that it was not perfectly safe to cross track number 1, a reasonable distance from the end of said string of standing cars. There was nothing to indicate to Fred Mustell or to any one else that a string of cars was going to be crashed against the standing string of cars with sufficient violence to cause the whole string to move four or five car lengths suddenly, so as to catch Mustell before he could get away, Mustell knowing, as he probably did know, and as defendant alleges he did know, that said string of sixteen cars had their brakes set, or were, in other words, "tied down."

ARGUMENT.

We have used the terms plaintiff and defendant instead of plaintiff in error and defendant in error, and will continue to use the same terms in our argument.

At the outset, we wish to correct one inference or statement made in defendant's brief, and this to the effect that the motion for non-suit and motion for directed verdict at the completion of all the evidence was not argued to the Court. Counsel knows very well unless his memory is exceptionally deficient, that the above motions were thoroughly argued by him, but so well did Judge Rudkin remember the evidence, and so well versed is he in the law of these cases, he did not desire to

hear the plaintiff's argument in resistance of said motions. We admit that he did refuse to hear any argument when the motion *non-obstante-verdicto* was made, because all of the points had been so thoroughly thrashed out before, and so well satisfied was the Court with his former ruling, that a repetition of the same argument was unnecessary; therefore, when counsel say that this Appellate Court is the only Court that has had an opportunity to hear arguments on the questions of law involved in this case, the most charitable statement we could make is that he is in error.

This case was partly tried in the Superior Court of Spokane County, and upon plaintiff's motion, a voluntary non-suit was granted and suit brought in the Federal Court. Prior to the partial trial in the Superior Court, and before the energetic counsel for defendant had talked with or seen witnesses Henry Cantley or Thomas D. Farmer, counsel for plaintiff took the precaution to get a written statement from each of these witnesses, signed by themselves, in which they stated just how the accident occurred. Thereafter, as the record shows, witness Cantley, who was still in the employ of the Company, but had been subpoenaed by plaintiff, made frequent trips to the office of the attorney for the defendant, and on numerous occasions discussed the case with said attorney, as also did witness Thomas D. Farmer, who was one of the crew that killed Mustell, and thereafter, when

both of these witnesses were called by plaintiff for the purpose of proving their case against the defendant, the record will show that they squirmed around and attempted to reconcile their former written statements with their testimony, and at the same time testify as favorably as possible to their employer. The statement made in writing by Farmer before he had made the numerous visits to the offices of the attorney for defendant, and before he had ever seen said attorney, were offered in evidence in the case, and read to the jury, and the witness Farmer testified that said statement in writing *was true*. Of course the Company's attorney tried to reconcile the written statement with his testimony, tried to change the sequence of events so as to make said written statement consistent with defendant's theory of the accident, but we say the jury had a right to consider, and find as a fact, that the statement made in writing when said witness Farmer was wholly independent of any influence, when he was not working for the Company and lived down at Cheney, Washington, when he had no object in telling anything but the truth, was the true statement of just how the accident happened, and the sequence of events was in fact as related by him in said written statement, and especially so, when upon the stand as a witness the said Farmer testified that the facts contained in said written statement were true. On cross-examination he testified as follows (Rec. p. 45):

"Q. Then the engine did not shove the cars after the collision between the engine—

A. Yes, they did.

Q. Just a moment. Then the engine did not shove the cars after it coupled into them, at all, did it?

A. Yes, sir.

Q. Since the last trial of this case, you have been up into Mr. Albert's office on numerous occasions, and he has talked to you about this case, notwithstanding the fact that you were subpoenaed as our witness and was called by us at the former trial, and re-hashed and rehearsed your testimony in his office on two or three occasions, haven't you?

A. I have been up in Mr. Albert's office, yes, sir.

Q. And he has been talking to you about your testimony and what you knew about the case?

A. He said very little to me about the case.

Q. I didn't ask you how little or how much; he has been talking to you about it, hasn't he?

A. Yes, sir.

Q. When you made this statement that I have shown you, you had not talked to Mr. Albert or Mr. Ryan, the claim agent at all, had you?

A. Yes, sir.

Q. Didn't you testify—

A. I talked to Mr. Ryan.

Q. You talked to Mr. Ryan?

A. Yes, sir.

Q. But you did not talk to Mr. Albert?

A. No, sir, I did not.

Q. Now, since you have talked to Mr. Albert, after making this statement that you cut the cars off and they came in collision with the other cars which caused them to move four or five car lengths—

A. I didn't say it was just before the cars was coupled—

Q. Wait a moment. You now say that you moved into them and moved up about a car length before you cut them off?

A. Yes, sir, we moved into them and as soon as I could get over there and cut the cars off I did so.

Q. What do you mean by saying, "Just before cars taken in by us reached cars standing on track 1, Foreman Steinhouse ordered me to cut cars off and I did so, and cars struck the cars standing on No. 1, bumping them back four or five car length." Is that true?

A. That is true."

Therefore, we will say according to this statement, and Farmer's evidence that the statement is true, the jury would have a right to find that the cars taken in on track No. 1 were being shoved rapidly by the engine; that the cars were then cut off from the engine, leaving the engine standing still, and the "smoke going straight up." The cars run down upon their own momentum, striking the sixteen cars so violently as to cause them to move all at once without taking up slack, or giving any other warning, so that the rear end of

said string of cars moved so suddenly that Mustell did not have time to get out of danger, and thereafter said cars continued to move four or five car lengths.

Let us ask this question, "What does the witness Farmer mean when he says, 'and cars *struck* the cars standing on number 1, *bumping* them back four or five car lengths?' " and he says, "This statement is true"; in other words, that is exactly what happened. Afterwards, upon being called as a witness for the defendant company, and in order to favor the company, he tries to say the switching operation was simply a shoving and not a bumping or striking of cars against other cars. Of course, we do not know what he would have said in the interest of the railroad, if we did not happen to have him tied up with a written statement, before he *saw* the company's attorney. It was claimed by defendant's witnesses, that it was intended to move said string of cars four or five car lengths so as to clear the track in some manner. If that is true, let us ask why was it necessary to slam a string of cars against a standing string of cars in the manner in which they did? And again defendant tries to extricate itself from the charge of negligence by saying this was the usual and customary way of handling cars in the Hillyard yards. Of course the jury is not compelled to believe such an unreasonable and ridiculous statement made by the employees of a

railroad company, even if such statement was undisputed. On page 47 of the Record, Farmer testifies as follows:

> "Q. If it was necessary to move that string of cars four or five car lengths, was there anything to prevent the engine from pushing them on that distance and then cutting off?
>
> A. No, sir."

Therefore, if it was not necessary to move those cars in the manner in which they were moved, isn't that a circumstance tending to dispute the witness for the company testifying that such violent movement was usual and customary? It must be presumed that when switching crews are exercising reasonable care in the handling of their trains and cars, that when they desire to place cars upon a certain part of the track, they do so in a manner least calculated to injure other employees who may be performing their duties in said yards, and less calculated to smash up and destroy railroad equipment. It might be that when a faithful employee has been killed by the gross and almost wanton negligence and recklessness of train crews or switching crews, and he is not alive to dispute what is said against him, that said train crews would be allowed to testify that it was usual and customary to carry on switching operations at a speed of a mile a minute, but no reasonable jury who are possessed of a human thinking apparatus would be expected to believe such impossible statements, whether disputed or undisputed, and the

juries are instructed in every case, that they are not compelled to believe any statement of any witness which appears so improbable as to, in their minds, destroy its value as evidence. Henry Cantley, on page 35 of the Record, testifies as follows:

> "Q. Can't you tell whether or not you could see westerly what was going on there (meaning looking toward the engine)?
>
> A. I could see up as far west all right. I did not see these cars come on to these other cars. I looked."

On page 34 of the Record, he testifies:

> "I didn't see any cars moving on this track.
>
> Q. What was the first indication to you that cars were moving on track number 1, if they were moving?
>
> A. I heard the crash of the coupling. The end of the car that Mustell and I were passing by at that time moved very quickly. It hit Mustell."

On page 78 of the Record, he testifies:

> "Q. On this particular occasion, you being right behind Mustell, as you have heretofore described, and a considerable distance from where he was, you just barely had time to get out of the way so the car would not hit you, didn't you?
>
> A. Yes, sir."

Again on page 79 of the Record, he testifies:

> "Q. On account of the quickness with which it moved?

A. Yes, sir.

Q. You didn't see anything to indicate that any car was coming against that string of cars, did you?

A. No, sir, I just glanced up in a casual manner and saw the way the smoke was going straight up. I didn't have the purpose in mind of seeing if there was any danger. As I said before, you can't tell when cars are going to move.

Q. As a matter of fact, when you didn't see anybody on top of that car and did not see any man on the ground and did not see any indication of any cars coming, you thought you were perfectly safe in crossing there at that time.

A. Not any more than—

Q. (Interrupting) Well, you thought you were perfectly safe.

A. We certainly would not have tried to cross if we thought there was danger there."

The Court will notice in reading this testimony on record, that the witness tried to inject into his answers statements indicating that he was not thinking anything of danger, and was not paying any attention to anything, which statements it is apparent were injected into his answer to voluntarily destroy any benefit his answers might be to plaintiff, which to any reasonable or rational mind is the result of his numerous visits to the office of the defendant's attorney, but in any event, what he might have thought is no criterion of what Mustell thought, or what precautions Mustell took, be-

cause the law will presume that Mustell was in the exercise of reasonable care in crossing that track; that he looked up and made every observation which he could make to ascertain any apparent danger, regardless of what Cantley might have done in observing or desiring to observe; therefore, it is immaterial what Cantley thought, or what purpose he had in mind, or whether or not, he, Cantley, was reckless or otherwise, as this would not be binding upon the deceased. The Court must presume in the face of this Record, that at the time Mustell was hit by the end of this string of cars, he might have been ten feet away from the standing string of cars, for the reason that Cantley testifies that he cannot tell whether Mustell was one foot or ten feet, and the only reason that he gave the distance which he did give when testifying, was because "they wanted to know, and I said I could not give a definite distance."

On pages 41 and 42 of the Record, he testified as follows:

> "Mr. Plummer: Q. And this distance that you have illustrated here a while ago was given to you upon a suggestion by Mr. Albert, wasn't it?
>
> A. I don't know as it was; no, sir.
>
> Q. On the trial of the other case?
>
> A. The only thing, as I said before, I would not swear to the distance, and I won't now.

Q. That is what I say, whether it was one foot or ten feet?

A. No, sir.

Q. But that was done, wasn't it, upon a suggestion of Mr. Albert?

A. Well, the only reason I gave that was because they wanted to know, and I said I could not give any definite distance.

Q. And you wanted to say something?

A. Well, I had to answer the question some way."

Therefore, considering the evidence in the most favorable light to the plaintiff, and the most favorable light would be that he was ten feet away, and so not guilty of contributory negligence in being too close to the car; that this string of cars was struck violently enough to move a distance of ten feet so quickly that Mustell could not get off the track by jumping or using every possible effort to do so, and that Cantley barely escaped with his life.

On page 39, Cantley testifies (Tr. of Record):

"Mr. Albert: Q. Now, you spoke of them moving very quickly. I wish you would describe what you mean by that. (Referring to the string of standing cars.)

A. Well, in kicking as a usual thing, when they kick down—

Mr. Plummer: We object to what is usual."

The Court will see by this testimony, that ac-

cording to Cantley's idea the cars actually were kicked against these other cars. He used the word "kicking," and "when they were kicked down, etc."

This is wholly inconsistent with Farmer's subsequent statement that the cars were being *shoved by the engine going about three miles an hour.* In this testimony, it is also shown by Cantley, *"I could hear the crash of these cars up ahead only at the time they struck."* He says he never paid any attention to the slack being taken up, but that isn't saying that if the slack had been taken up, that Mustell would not have paid any attention to it, and of course, if the slack had been taken up, it is reasonable to infer that it must have been done one car at a time, and Mustell would have had plenty of opportunity to get out of the way. Again, this witness Cantley, for the purpose of assisting the railroad company, his employer in every manner possible, injects into his testimony the statement, "What is usually done in switching operations" and also testifies that this switching operation was one of the usual and ordinary methods of switching cars, and that this switching operation that killed Mustell was nothing different than was usually carried on in the yards in handling switching operations; and he testifies on pages 77 and 78 of the Record as follows:

> "I had observed switching before around those yards in a general way.

Q. I will ask you whether or not there was any difference in the movement of that car at that time than other movements in the yards previous to that."

(Of course this question was asked for the purpose of showing it was an ordinary movement, and the deceased Mustell assumed the risk and he is dead and cannot dispute the witness.)

"A. Not that I know of, in particular. During the period I was with Mustell switch engines were moving around all over the yards without notice or warning to him."

But, the witness evidently forgets himself, and on cross-examination, testifies as follows (Tr. p. 78:)

"Q. Now, Mr. Cantley, you say sometimes you saw men on the end of the cars when they were being shoved down?

A. Yes, sir.

Q. And when they were kicked down?

A. I don't know—

Q. You don't know what the movements were?

A. No, I don't.

Q. What kind of business were you in before you went with Mustell to learn the car checking business.

A. I was material clerk in the store department.

Q. And you had no knowledge about anything about the yards, had you?

A. No, sir.''

Still the defendant has the effrontery and the supreme assurance to offer this man's testimony as an expert witness to the effect that the switching operation that killed Mustell was the usual and ordinary switching operation in that yard, and this, in the face of the fact that Cantley said he didn't see any danger and nothing to indicate danger when he attempted to cross the track with Mustell, and in face of the fact that must be presumed that Cantley himself was not anxious to commit suicide; that if this was the ordinary and usual movement with which he, Cantley, was familiar before the accident, he himself would not be caught unawares as he was and almost crushed to death, the same as was Mustell.

Of course, we will admit that we are criticizing to some extent what might be technically called our own witnesses, but in this kind of a case where the employees of the company are under the thumb, influence and implied threats of the higher officials of these railroad corporations on account of power to discharge and of promotion, and which officers are held responsible for these classes of accidents to the higher officials at headquarters, and considering that we are compelled to use these employees in order to prove to some extent some parts of our case, and where such employees, when they are so tied up that they cannot testify to facts contrary to the statements they have previously

signed in writing without laying themselves liable to prosecution for perjury, nevertheless strain every nerve, and exert their utmost energy to inject into their answers voluntary statements specially favorable to their employer, we have a right to consider them as hostile witnesses. Their very attitude clearly shows that they are in fact present in Court to testify to everything possible, favorable to the Company, whether true or untrue, knowing as they do know, that we are compelled to put them on the stand in order to prove certain important facts in establishing liability, and which they cannot wholly dispute. The Court in interest of Justice, will not hold us bound by voluntary and irresponsive answers of this class of witnesses.

As to what switching operations were being carried out at the time Mustell was killed, we claim there is a direct conflict of the evidence, and we will make a statement of what the defendant claims was the switching operation, which was being carried out at the time Mustell was killed, and then show how this contention on the part of defendant is disputed, by:

1st. The testimony of some of the witnesses.

2nd. The physical facts.

3rd. Circumstances which are inconsistent with the defendant's theory.

Defendant claims that a string of ten or twelve cars was standing on track number 1, tied down,

with brakes set. The engine then shoved another string, composed of eight or ten cars, easterly, and attempted to couple on to the second string of cars, which were standing still; that Mustell was passing over track number 1, on the east end of the original standing string of cars; that when the crew attempted to couple onto the second string of cars on the west end, the two strings of cars came together, but without sufficient force to even cause the "coupling pin to drop." This impact did not move any of the standing string of cars that hit Mustell, and thereafter the engineer pulled the second string of cars backward, or westerly, two or three feet, and then brought the two strings of cars together again sufficient to make the coupling, and then continued on with both strings of cars, killing Mustell. It will be observed that all of defendant's witnesses testified that this engine never moved, and the cars never moved, to *exceed three and one-half miles* an hour before and at the time they hit Mustell, that this was an *ordinary* and *usual* movement of cars in the yard, of which Mustell knew by his experience in and about the yards; that this movement was not an extraordinary and unusual movement, was not negligent, and if it were such a movement, i. e. ordinary and usual, it was familiar to Mustell, who assumed the risk.

We will admit now that if this sort of a movement of the cars was made in the manner testified to by defendant's witnesses, and with the slowness which said witnesses testified to, then the plaintiff

herein cannot recover, and this judgment should be reversed.

The plaintiff contends that the evidence in this case supports her theory of the switching operations, which is as follows:

That Mustell was crossing the east end of the string of standing cars, at a reasonably safe distance therefrom, considering any apparent or threatened danger, or danger which would result to him from any *usual* or *ordinary* movement of that string of cars; that while said string of cars was standing still, tied down, the switching crew, in some manner, kicked or propelled said second string of cars against the standing string of cars so violently and with unnecessary and unusual force, causing said standing string of cars to be *bumped* back three or four car lengths, and so suddenly that it was impossible for Mustell, being but twenty-three years old and especially active, to get out of the way and escape injury; that the crash of the second string of cars was so violent an impact that the whole standing string of cars moved suddenly a distance of three or four car lengths with the brakes still set; that there was no indication either by usual noise, movement of cars, puffiing of engine, or anything else west of the standing string of cars, to indicate to Mustell or Cantley, who was with him, that there was any danger of the standing string of cars moving.

That the jury had a right to consider that if the

cars were moved in the manner which we contend they were moved, that this was not an *ordinary* and *usual* movement, but an extraordinary and *unusual* movement, wholly uncalled for and wholly unnecessary, and the sort of movement that Mustell could not anticipate.

We say that according to the physical facts, and reasoning from cause to effect and considering the direct and circumstantial evidence, there is abundant evidence to support our theory of the way the accident happened and the charge of negligence.

1st. Mustell was a careful employee; he had warned Cantley about being careful while being in and about the cars; he had been warned himself about the danger of the *usual* and *ordinary* switching operations, and he knew of such *usual* and *ordinary* switching operations, and the danger incident thereto. (Record p. 73.) Testimony of Walter Law:

> "He (Mustell) could get around pretty good. He was a pretty active man."

W. F. Kipple instructed Mustell about the danger incident to ordinary switching operations.

Cantley testifies as follows on page 77 of the Record:

> "That Mustell warned him about the usual danger of switching operations."

On page 79 of the Record, Cantley testifies as follows:

> "That he didn't see any indication of any cars coming, and nothing to indicate danger."

2nd. The first thing that Cantley heard was the crash of the coupling on the west end of the standing string of cars (Rec. p. 39). The smoke of the engine was apparently going straight up (Rec. p. 33). He didn't see any cars moving on this track (Rec. p. 34). On page 34 of the Record, he testifies as follows:

> "Q. What was the first indication to you that cars were moving on that track No. 1, if they were moving?
>
> A. I heard the crash of the coupling. The end of the car that Mustell and I were passing by at that time moved very quickly. It hit Mustell.
>
> Q. You didn't hear any taking up of slack or anything of that kind?
>
> Well, I don't know whether the jury would or not, but I just want to know whether there was any taking up of slack or anything of that kind before the other one moved, or whether as soon as the crash came the car that struck Mustell moved practically the same time.
>
> A. Yes, sir. Sometimes the tracks in the yards are crowded and other times they are not very many cars on them. I did not see these cars come on to these other cars. I looked."

Thomas D. Farmer testifies on page 45 of the Record, as follows:

"Q. I will ask you if you did not state to Mr. Lavin and myself in our office with reference to this switching, as follows, before the first trial of this case, and that you also testified to it at the last trial of this case: "Just before cars taken in by us reached cars standing on track 1, Foreman Steinhouse ordered me to cut cars off and I did so, and cars struck the cars standing on No. 1, bumping them back four or five car lengths?"

A. Yes, I did.

Q. And is that true?

A. Yes, sir."

Page 47 of the Record he testifies to the same thing, and as follows:

Q. If it was necessary to move that string of cars four or five car lengths, was there anything to prevent the engine from pushing them on that distance, and then cutting off?

A. No, sir."

The testimony throughout shows that these yards were being used for all usual yard purposes; that two or three hundred men each day would cross these yards and tracks while switching operations were going on; that numerous employees were working in and about these cars at all times, yet the switching operations were of that character which killed Mustell; that the first sign or indication that anyone heard was when the string of cars crashed into the standing string of care hereinbefore referred to, with sufficient force to move the standing string of ten or twelve cars simul-

taneously, before Mustell, who was an active man (page 73 Record) could get out of the way, he, at the time, being in the exercise of reasonable care; and therefore a reasonably safe distance away from said standing string of cars.

Witness for defendant, G. F. Garvin, testifies as follows (Page 94 of Record):

> "Q. It would take considerable force, wouldn't it, to send those cars suddenly and violently * * * with that suddenness I have described, wouldn't it?
>
> A. No.
>
> Q. Wouldn't use much force?
>
> A. No.
>
> Q. Do you pretend to say that could be done, if an engine was going through at 3½ miles per hour?
>
> A. I do.
>
> Q. So that a man could not get out from behind it?
>
> A. *No, I would not say that.*"

This witness also testifies on the same page that there was about two feet of slack between each car.

On page 92, testimony of Garvin, it says (Cross-examination, MR. PLUMMER):

> "I heard Mr. Gebhart's description about switching operations that were done at the time this man was killed, and I answered that I had seen this kind of similar operation. I think I based that upon the facts that Gebhart testified it was going only about 3 or 3½ miles an hour."

"Q. That is the usual custom, isn't it?

A. About that.

Q. In other words, the custom in handling these cars is about the speed testified to by Gebhart?

A. That is generally about the speed."

Now, we contend that if the string of cars was being moved at the rate of only three or three and a half miles an hour, it would have been impossible for Mustell to have been caught and killed; at least the jury had the right to consider the reasonable probability of him being killed in such a switching operation, considering that he was exceptionally careful, knew the dangers incident to that kind of switching operation; that he was at the time, a reasonably safe distance from the end of said string of cars, and that Henry Cantley, a young boy especially active, and who was further away from the end of the cars than Mustell, had barely time to jump and escape with his life. We say that the physical fact that this string of cars moved so suddenly as it did move, and simultaneously, and also the fact that the engine was apparently standing still when this crash was heard, the smoke going straight up, and the crash being of sufficient violence to move this large string of cars with the brakes set a distance of four or five car lengths, is wholly inconsistent with defendant's theory that this switching operation was simply a *shoving of cars;* that the first time the second string of cars came together with the stand-

ing string of cars that it did not strike hard enough to cause the pin to drop; that none of the standing string of cars moved at all at that time; that the engine then backed up about two or three feet and again coupled onto the standing string of cars and continued shoving the cars at the rate of three or three and a half miles an hour.

Every sane person, whether he is an engineer, railroad man, or whatever employment he may be in, knows that it is a physical impossibility for an ordinary switch engine, having a distance of only two or three feet to run, starting from a standstill and going only a distance of two or three feet, to move a string of ten or twelve cars, standing still and tied down with brakes, with sufficient violence to make the whole string so suddenly move while running at three miles an hour (about as fast as a man could walk), as to almost kill two men who happened to be passing at the west end of said string of cars, and the jury would have a right to consider these physical facts, and reason from cause to effect, in demonstrating the utter improbability that such a switching operation, as claimed by the defendant, was being carried on. And, considering these physical facts also, with the original statement made by witness Farmer, we say there is abundant evidence to take the case to the jury on the theory of an extraordinary and unusual switching operation, the character of which could not have been anticipated by the deceased, Fred Mustell. The cases cited in the brief of defendant

are cases where the *usual* and *ordinary* switching operations are being carried on, and not unusual and extraordinary movements of cars, and those decisions only hold what we concede to be the law, that a man working in the yards of a railway company assumes the risk of injury from any *usual* and *ordinary* movement of cars which he had notice, or in the exercise of reasonable care, he ought to have had notice of or should have anticipated. That is as far as any of the decisions go, and the converse rule must be admitted to apply to cases, where the movement is *unusual and extraordinary* and the employee does not assume the risk of injury from that sort of movement.

It seems to us that the claim of "assumption of risk" has no place in this case, for the reason that if the movement of the cars was *not unusual and extraordinary,* then it was not negligent, and the deceased would have assumed the risk of such an ordinary and usual movement, and for the Court to hold that Mustell assumed the risk of injury from the particular movement which the jury had a right to find *was actually made,* then it must hold as a matter of law that said switching operation was *not* an extraordinary and unusual movement, and that no two reasonable minds could differ on that subject.

On the question of assumption of risk, this Court has laid down the law, which is concurred in by all of the Courts in the case of Williams vs. Bunker

Hill & Sullivan Mining and Milling Company, case No. 2110, decided October 7th, 1912, and reported in 200 Federal 211, 118 C. C. A., page 397, which was a writ of error sued out in this same District Court as the case at Bar. We do not like to burden the Court with a resume of all the evidence in the Record, and as the Record is very short, we assume the Court will probably read it all, therefore, we have refrained from repeating same in our brief excepting sufficient to prove to the Court that the jury had a right to find from the evidence that it was not necessary or usual to make the violent movement of these cars that was made, and if it were necessary to move them up four or five car lengths, that the same could have been shoved slowly and without danger to Mustell at a speed of about 3 miles per hour, as was usual (Rec. p. 92, witness Garvin), and therefore, it being unnecessay, it was not done for that purpose. If it was not done for that purpose, then the driving in on number 1 track of a string of eight or ten cars with sufficient speed and force to strike a standing string of cars with such extreme violence (considering the fact that numerous men were in and about those cars in the performance of their duties, at all times), we think was gross negligence, wholly uncalled for and inexcusable. Switching crews know that men are constantly in and about these cars and through the yards in the performance of their duties, in which their minds are absorbed, to more or less extent, and cannot always see just what

is going on, but they usually have an opportunity to get out of the way of danger which may result from the *usual* and *ordinary* switching operations, and to carry out a movement of cars as this was carried out is certainly almost criminal negligence.

Counsel contend and insist that Mustell was only two or three feet away from the end of the car when he was hit. We say the evidence is uncertain as to this distance; in other words, the jury could not find as a fact just what distance Mustell was from the end of the car. Cantley does not know, but tried to estimate from memory, and declares that he cannot tell how far, whether it was "one foot or ten feet;" therefore, his testimony on that subject, being of such uncertain and unsatisfactory character for the purpose of establishing distance, the jury has the right to indulge in the presumption of law (inasmuch as Mustell is now dead, that he was an extraordinarily careful and active person), that he was not guilty of negligence, and therefore was passing said string of cars at a reasonably safe distance therefrom, considering the *usual* and *ordinary* movement of cars in said yard, and if he was caught and killed while exercising said care, it is a reasonable inference that it was on account of the extreme and extraordinary quick movement of the whole string of cars, which he could not anticipate and of which he had no notice of warning.

Another fact is apparent by the Record, and that is that the engineer who operated that engine was not called and sworn as a witness by the defendant;

neither was his absence accounted for, and it is a reasonable inference to be drawn from such facts that if he was called and sworn, he would testify adversely to the contention of the Company.

We say, therefore, in all sincerity, that the evidence produced by the plaintiff, including the favorable evidence brought out on cross-examination of the defendant's witnesses, together with the presumptions of law to be indulged favorable to the deceased, and all of the reasonable inferences to be drawn from the evidence, that the jury were fully warranted in finding as they did find, by their special verdict:

> "1st. Question. Were the cars that struck Mustell moved in a manner extraordinary or unusual?
>
> Answer. Yes.
>
> 2nd. Question. Did Mustell assume the risk?
>
> Answer. No, unusual risk.
>
> 3rd. Question. Was the negligence of Mustell the sole cause of his death?
>
> Answer. No."

All of which is respectfully submitted.

PLUMMER & LAVIN,

Attorneys for Defendant in Error.